BAHARUDDIN MD. SEH & ORS.

v.

ABDUL RAHMAN LISI & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMMED J
[CIVIL SUIT NO. 84/1982]
23 NOVEMBER 1982

CIVIL PROCEDURE: *Injunction - Application for reinstatement - Contract of transfer of shares - Share certificates held by third party - Order for return - Stay of execution - Effect - Suppression of material facts.*

Pending completion by the plaintiffs of a contract for purchase of shares in Gabongan Putra Sdn. Bhd. ("the company"), the share certificates of the company were deposited with a third party, a firm. The plaintiffs gave notice to complete the contract but were nine months late. The defendants rejected the notice of completion and on 26 September 1981, rescinded the contract. On 11 November 1981, they brought an action for the recovery of the share certificates and other documents. On 13 March 1982, the plaintiffs were granted an injunction restraining the defendants from dealing with the company's shares or property. On 29 May 1982, judgment was delivered in favour of the defendants in their action and the share certificates were ordered to be returned to the defendants. The plaintiffs, however, obtained a stay of execution of the judgment. On 16 November 1982, on the injunction being dissolved on the application of the defendants, the plaintiffs applied for reinstatement of the injunction.

Held:

[1] The reason for granting the injunction had ceased to exist consequent to the judgment in the suit brought by the defendants and an injunction could no longer serve any useful purpose. The plaintiffs' interest pending appeal was sufficiently protected by the order to stay of execution of the judgment.

[2] There was suppression of material facts by the plaintiffs in obtaining the injunction. The facts that the defendants had rejected the notice of completion to purchase on the ground of breach of the agreement and that the defendants had rescinded the agreement were material facts which would have had prevented the issue of *ex parte* injunction by the Court.

[3] Of equal importance was the plaintiffs' conduct in respect of the subject matter of the suit before completing the purchase. Though the plaintiffs had agreed to discharge the guarantors for the loan incurred by the company with Bank Bumiputra Malaysia Berhad, they had not done so, and thereby putting the guarantors at great risk. Their conduct disentitled them to protection in Courts of equity.

[4] The affidavit in support of the application for reinstatement was substantially the same as that supporting the original injunction; no new cause was shown by further evidence.

[Application dismissed.]

Other sources referred to:
Row's Law of Injunctions, 5th Edn., Vol. 1, p. 113

For the plaintiffs - Eva Kwong; M/s. Yee & Kwong
For the 9th respondent - Nijar; M/s. Nijar & Nijar
For the 1st to 8th respondents - Upali Masacorale; M/s. Jackson & Masacorale

JUDGMENT

Mohd. Yusoff Mohamed J:

This application is for reinstatement of an injunction dated 13 March 1982 obtained by the plaintiffs which was dissolved on 16 November 1982 by this Court.

The basis for issuing the original injunction, according to the first plaintiff's affidavit dated 13 March 1980, was an agreement dated 1 November 1980 for sale of shares in Gabongan Putra Sdn. Bhd. of the ninth defendant's company (the company) to the plaintiffs. The remaining defendants are the existing directors of the company. Pending completion of the purchase by the plaintiffs, the share certificates of the company were deposited with M/s. Hassan Yunos and Company together with transfer forms duly executed in escrow.

On 5 August 1981, the plaintiffs gave notice according to the terms of the agreement but nine months late, to complete the purchase of the company. Subsequently, he said that the plaintiffs found the defendants had conspired by issuing new shares to their directors with the intention of securing a breach of the agreement. He further said that on 11 November 1981, pursuant to that conspiracy, the defendants caused a writ to be issued in Civil Suit No. 368/81 against M/s. Hassan Yunos and Company to recover those share certificates and other documents from the firm.

He also contended that if the suit in Civil Suit No. 368/81 was decided in the defendants' favour, the judgment would be totally ineffective and the plaintiffs would suffer irreparable damage in that the plaintiffs would be deprived of control of the company and its assets comprising in Grant 1740 Lot 1080 Mukim of Tebrau, Johore Bahru containing an area of 459 acres approximately.

The original injunction in the following terms, restrained the defendants in:

(a) allotting or issuing any shares of the 9th defendant to any person or persons or corporate body other than to the plaintiffs;

(b) issuing replacement share certificates to replace the existing share certificates presently in the custody of M/s. Hassan Yunos & Co. advocates and solicitors;

(c) appointing or replacing any director or directors of the 9th defendant;

(d) dealing with, disposing or otherwise how so ever dissipating the assets of the 9th defendant or from increasing the liabilities of the 9th defendant.

The 1st defendant in his affidavit in support of the application to dissolve the injunction said that since the original injunction was issued, the judgment in Civil Suit No. 368/81 was delivered on 29 May 1982 by Yusof Rashid J who held in that suit that the plaintiffs had breached Clause 11 of the agreement dated 1 November 1980 in not providing replacement of guarantors to the loan of RM4.6 million incurred by the company with Bank Bumiputra Malaysia Berhad. The plaintiffs also admitted that they were in breach of the said Clause 11 of the agreement but contended that it was not fundamental. However, the Judge held that the rescission of the agreement by the defendants was validly made and he ordered for the return of the share certificates to the defendants.

The plaintiffs appealed and obtained a stay of execution of the judgment.

In these circumstances the defendants contended that the plaintiff's, allegations were untenable and the injunction ought to be dissolved.

I agree with the defendants' contention in that the reason for granting the injunction particularly that at para. (b) above has ceased to exist consequent to the judgment in Civil Suit No. 368/81 and it can no longer serve any useful purpose. The plaintiffs' interest in that regard pending appeal is in my view sufficiently protected by the order for stay of execution of the judgment.

The defendants also disclosed that there was the suppression of material facts by the plaintiffs in obtaining the injunction. Firstly, the land referred to by the plaintiff in his affidavit in support of the injunction has been caveated on 24 August 1981 by them, and that there was no danger of it being disposed off by the defendants. Secondly, the defendants had on 12 August 1981 rejected the plaintiffs' notice of completion to purchase on the ground of breach of the agreement by the plaintiffs, and on 26 September 1981, the defendants had rescinded the same agreement.

While I agree with the plaintiff's, contention the fact that the land referred to in the affidavit in support of the injunction has been caveated, is not a material fact as to affect the merits of issuing the injunction, the same cannot be said of the breach and rescission of the agreement by the defendants. The agreement which has been rescinded and remained so at the material date when the injunction was issued is the whole basis of the injunction. Without the agreement, the injunction sought could not be issued.

There is no denial by the plaintiffs of the rescission of the agreement by the defendants. There is no declaration sought in this action to the effect that the agreement was still valid and subsisting or the rescission by the defendants was nugatory and void. These facts, in my view, are material facts which would have prevented the issue of *exparte* injunction by the Court as prayed by the plaintiffs.

Of equal importance was the plaintiffs' conduct in respect of the subject matter of the suit before completing the purchase. The plaintiffs had agreed to discharge the guarantors for the loan by 1 May 1981. This has not been done by the plaintiffs when they gave notice to complete the purchase on 5 August 1981. This has not been done by the plaintiffs when they gave notice to complete the Purchase on 5 August 1981. The guarantors were old directors of the company who no longer retained interest in the company. See affidavit at enClause (32). The interest on the loan accrued was at RM73,374.61 per month which the guarantors had to bear on their personal guarantees. Since the injunction was obtained, a sum of RM592,000 has been accrued as interests towards the loan. As on 13 July 1982, the amount owing to the bank by the company was RM6,244,280.58. The Bank had intimated that it would recall the loan and if that was done, the forced sale value upon foreclosure of the land charged, would not meet the sum owing. The guarantors would have to bear the difference. In that situation, the plaintiffs would put the guarantors at risk of losing RM73,374 per month for any delay in dissolving the injunction. The guarantors are third persons and not standing to benefit by the plaintiffs' transaction with the defendants. Their interest are, in my opinion, entitled to be given weight on this application for dissolution proceeding. The plaintiffs' conduct in failing to discharge the guarantors, in my view, disentitled the plaintiffs to protection in Courts of equity.

Upon these grounds, the original injunction was dissolved which is now the subject of both *exparte* and interparties application for reinstatement. I dealt with the application as inter-parties and called both parties to argue the issues.

The affidavit in support of their application for reinstatement is substantially the same as those supporting the original injunction. No cause is shown by further evidence that the original injunction should be reinstated. See *Row's Law of Injunctions*, Vol. 1, 5th Edn., p. 113 and for these reasons I dismissed the application with costs.

Also found at [1983] 2 CLJ 82